

§ 768.6

15 CFR Ch. VII (1–1–14 Edition)

(e) Claimants and TACs are advised to review the foreign availability assessment criteria described in § 768.6 of this part and the examples of evidence described in Supplement No. 1 to part 768 when assembling supporting evidence for inclusion in the FAS or TAC certification.

§ 768.6 Criteria.

BIS will evaluate the evidence contained in a FAS or TAC certification and all other evidence gathered in the assessment process in accordance with certain criteria that must be met before BIS can recommend a positive determination to the Secretary. The criteria are defined in § 768.1(d) of this part. In order to initiate an assessment, each FAS and TAC certification should address each of these criteria. The criteria are statutorily prescribed and are:

- (a) Available-in-fact;
- (b) Non-U.S. source;
- (c) Sufficient quantity; and
- (d) Comparable quality.

§ 768.7 Procedures.

(a) *Initiation of an assessment.* (1) Once BIS accepts a FAS or TAC certification of foreign availability, BIS will notify the claimant or TAC that it is initiating the assessment.

(2) BIS will publish a FEDERAL REGISTER notice of the initiation of any assessment.

(3) BIS will notify the Departments of Defense and State, the intelligence community, and any other departments, agencies and their contractors that may have information concerning the item on which BIS has initiated an assessment. Each such department, agency, and contractor shall provide BIS all relevant information concerning the item. BIS will invite interested departments and agencies to participate in the assessment process (See paragraph (e) of this section).

(b) *Data gathering.* BIS will seek and consider all available information that bears upon the presence or absence of foreign availability, including but not limited to that evidence described in § 768.5 (b) and (c) of this part. As soon as BIS initiates the assessment, it will seek evidence relevant to the assessment, including an analysis of the

military needs of a selected country or countries, technical analysis, and intelligence information from the Departments of Defense and State, and other U.S. agencies. Evidence is particularly sought from: industry sources worldwide; other U.S. organizations; foreign governments; commercial, academic and classified data bases; scientific and engineering research and development organizations; and international trade fairs.

(c) *Analysis.* BIS will conduct its analysis by evaluating whether the reasonable and reliable evidence that is relevant to each of the foreign availability criteria provides a sufficient basis to recommend a determination that foreign availability does or does not exist.

(d) *Recommendation and determination.* (1) Upon completion of each assessment, BIS, on the basis of its analysis, will recommend that the Secretary make a determination either that there is or that there is not foreign availability, whichever the evidence supports. The assessment upon which BIS bases its recommendation will accompany the recommendation to the Secretary.

(2) BIS will recommend on the basis of its analysis that the Secretary determine that foreign availability exists to a country when the available evidence demonstrates that an item of comparable quality is available-in-fact to the country, from non-U.S. sources, in sufficient quantity so that continuation of the existing national security export control, or denial of the license application in question on national security grounds, would be ineffective in achieving its purpose. For a controlled country, such control or denial is “ineffective” when comparable items are available-in-fact from foreign sources in sufficient quantities so that maintaining such control or denying a license would not be effective in restricting the availability of items that would make a significant contribution to the military potential of any country or combination of countries detrimental to the national security of the United States.

(3) The Secretary will make the determination of foreign availability on the basis of the BIS assessment and